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**IN THE
COURT OF APPEALS OF INDIANA**

JERRY YOUNG,)	
)	
Appellant-Defendant,)	
)	
vs.)	No. 49A02-0602-CR-148
)	
STATE OF INDIANA,)	
)	
Appellee.)	

APPEAL FROM THE MARION SUPERIOR COURT
CRIMINAL DIVISION, ROOM 6
The Honorable Jane Magnus-Stinson, Judge
Cause No. 49G06-0507-FA-115445

May 9, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

SULLIVAN, Judge

Following a bench trial, Appellant-Defendant, Jerry Young, appeals his convictions and sentences for Attempted Murder, a Class A felony;¹ Aggravated Battery, a Class B felony;² and Resisting Law Enforcement as a Class A misdemeanor,³ for which he received an aggregate sentence of eighty-two years executed in the Department of Correction. Upon appeal, Young challenges the sufficiency of the evidence to support his conviction for attempted murder. Young also claims that certain statements were erroneously admitted into evidence in violation of his Sixth Amendment right to confrontation, and that the trial court, having ordered that the sentence in the aggravated battery conviction be served consecutively with the attempted murder conviction, erred in imposing an enhanced sentence on the aggravated battery conviction.

We affirm.

The record reveals that Shalena Tucker was staying with her mother, Della Tucker, and Della's mother's boyfriend, Young, at 833 1/2 North Keystone Avenue, Indianapolis, in April of 2004. According to Shalena, on April 20, 2004, she received a phone call from Young inquiring as to whether she had any of his money. She responded that she did not. Later that evening, when Shalena came home at approximately 11:00 p.m., she observed that the home was dark and that Della and Young were arguing first in the bedroom and then in the front room. According to Shalena, Della and Young, who were angry, were "tussling," grabbing each other, struggling, and wrestling. Tr. at 20.

¹ Ind. Code § 35-42-1-1; Ind. Code § 35-41-5-1 (Burns Code Ed. Repl. 2004).

² Ind. Code § 35-42-2-1.5 (Burns Code Ed. Repl. 2004).

³ Ind. Code § 35-44-3-3 (Burns Code Ed. Repl. 2004).

Shalena tried to stop Della and Young from fighting. Apparently Young temporarily left the scene. When he came back, Shalena heard her mother say, “[D]on’t stab my daughter,” whereupon she saw Young coming at her, “about to attack” her with his right fist in the air. Tr. at 25. Shalena was unable to get away, and Young stabbed her in the back and side with a screwdriver. Shalena then observed her mother on top of Young as the two struggled. According to Shalena, her mother subsequently indicated Young had stabbed her as well and showed Shalena her chest, which Shalena noticed was bleeding.

Shalena testified she left the house in an effort to find the police. Her only memory after that is being in an ambulance and the hospital, where she remained for approximately three to four days. According to Shalena, the stab wound had resulted in one of her lungs collapsing, and it had punctured her liver. Shalena testified that the stab wound came less than an inch from her spine, and she still has back problems.

Jessie Isaac testified that the night of April 20, 2004, he, his brother, James, and his friend, Jevon Jolley, heard someone screaming from the upstairs apartment in the house later determined to be 833 1/2 North Keystone Avenue. Upon observing movement in the upstairs window and hearing “tussling” and a woman’s screams for help, he, James, and Jolley went into the house, where he heard Shalena say she had been stabbed and that her mother needed help. Tr. at 36. Upon climbing the stairs, Isaac heard Young say multiple times, “I’m going to kill you, bitch.” Tr. at 37. Isaac observed Young leaning on top of Della. He, James, and Jolley grabbed Young in order to assist Della. Della tried to get on top of Young and help hold him down. Police arrived shortly thereafter. According to Isaac, police ordered Young and everyone to get on the ground,

which Young did not do. Isaac, who was lying with his face down, testified that Young stated that he was still going to kill Della, and then he stabbed her, at which point police stunned him with a stun gun. According to Isaac, Della indicated Young had stabbed her again.

Jolley testified that he was at the Isaacs' house when he heard a woman say multiple times, from the house across the street, "Get off my mother." Tr. at 52.⁴ Apparently these shouts were followed by silence, and then the voice said, "You stabbed my mother" and, "Get off of her." Tr. at 54. Upon walking across the street, Jolley heard the sound of breaking glass. After entering the house and ascending the stairs, Jolley observed Young "standing above" Della and holding a screwdriver in his hand. Tr. at 54. According to Jolley, Young told them to get out of the house. Jolley testified that the three in his group grabbed Young, at which point the police arrived, and Jolley assumed a position on the floor. According to Jolley, it appeared as if Young was going to approach Della and hit her again when police stunned Young with a stun gun, and he fell down.

Indianapolis Police Department Officer Chad Dixon testified that on April 20, 2004, at approximately 12:30 a.m., he and Officer Christopher Edwards responded to a report of a person being stabbed at 833 North Keystone Avenue. According to Officer Dixon, upon exiting his patrol car he heard a disturbance from the residence. In arriving at the scene, Officer Dixon observed Della seated on the floor and three men, namely James and Jessie Isaac and Jevon Jolley, holding Young down on the floor. Officer

⁴ It is unclear why the Isaacs' house at 1125 North Keystone Avenue would be located "directly across the street" from the building at 833 1/2 N. Keystone. Tr. at 52.

Dixon testified that Young did not comply with his order to lie on the floor and instead stood up and raised his fist over Della in an attempt to strike her, which Officer Dixon prevented by stunning him with a stun gun. Officer Dixon stunned Young three separate times before he complied. After Officer Dixon had handcuffed Young and the scene had been secured, Della, who had been hysterical but was calming down, stated that she and Young had been involved in a physical altercation and that he had stabbed her.⁵ Della further stated that Young had stabbed her with a screwdriver, which she picked up and showed to Officer Dixon. Officer Dixon testified that he then read Young his Miranda rights. Later, with no prompting from officers, according to Officer Dixon, Young commented that once he was released he was going to kill Della because “nobody takes money from him.” Tr. at 76. Contrary to Isaac’s testimony, Officer Dixon did not hear Young say, “I’m going to kill you, bitch.” Officer Dixon further testified that Young did not stab Della in his presence.

Dr. Christopher Evanson testified that Shalena sustained a stab wound to her right upper back on April 20, 2004, resulting in a lacerated and collapsed lung, injury to her diaphragm, and injury to her liver. Shalena also sustained injury to the skin and soft tissue under her left armpit, although this did not result in additional organ damage. Dr. Evanson further testified that the screwdriver found at the scene introduced as State’s Exhibit 16 was capable of inflicting the injuries suffered by Shalena, and that the

⁵ Defense counsel objected to Officer Dixon’s testimony as to Della’s statements on the basis that, whether or not this evidence qualified as an excited utterance under the hearsay rule, it nevertheless violated Young’s rights to confrontation as explained in Crawford v. Washington, 541 U.S. 36 (2004), as Della did not appear to testify at trial. The court overruled this objection.

majority of the shaft, if not the entire shaft, would have to have been impaled in her back to cause the injury to her liver. According to Dr. Evanson, certain major veins in the liver, if penetrated, often result in fatalities, and Shalena's injuries were within an inch of such veins. Dr. Evanson further testified that Della's skin laceration to the right of her lower sternum between her breasts was consistent with a penetrating object and that she would have skin scarring as a result of the injury.

On July 6, 2005, Young was charged with attempted murder,⁶ two counts of aggravated battery,⁷ intimidation,⁸ and resisting law enforcement, and he was alleged to be a habitual offender. After waiving his right to a jury trial, Young proceeded to a bench trial on December 7, 2005.

On December 8, 2005, the trial court found Young guilty of attempted murder, aggravated battery with respect to Shalena, and resisting law enforcement. During a January 20, 2006 sentencing hearing, the trial court found Young to be a habitual offender. The court further found that the aggravators outweighed the mitigators and sentenced Young to forty years for the attempted murder conviction, enhanced by thirty years due to his being found to be a habitual offender. The court additionally sentenced Young to twelve years executed for his aggravated battery conviction, with that sentence to run consecutively with his sentence for the attempted murder, and to an additional one-

⁶ Della was the alleged victim of Count I, attempted murder.

⁷ Shalena was the alleged victim of Count II, aggravated battery. Della was the alleged victim of Count III, aggravated battery.

⁸ Della was the alleged victim of Count IV, intimidation.

year sentence for the resisting conviction, with that sentence to run concurrently with the attempted murder sentence. Young filed his notice of appeal on February 21, 2006.

Upon appeal, Young first argues that the evidence was insufficient to prove he had the requisite specific intent to kill necessary for his conviction of attempted murder. In challenging the sufficiency of the evidence, Young argues that he and Della were merely involved in an escalated argument, and that Della was injured in that “mutual physical altercation” when Young, who was smaller than Della, wrestled the screwdriver away from Della after she allegedly attempted to stab him with it. Appellant’s Brief at 6. Young further points out that neither Jolley nor Officer Dixon corroborated Isaac’s testimony that Young had stated he was going to kill Della.

Our standard of review for a sufficiency-of-the-evidence claim is well settled. We do not reweigh the evidence or judge the credibility of the witnesses. Kien v. State, 782 N.E.2d 398, 407 (Ind. Ct. App. 2003), trans. denied. We consider only the evidence which supports the conviction and any reasonable inferences which the trier of fact may have drawn from the evidence. Id. We will affirm the conviction if there is substantial evidence of probative value from which a reasonable trier of fact could have drawn the conclusion that the defendant was guilty of the crime charged beyond a reasonable doubt. Id. Reasonable doubt is a doubt which arises from the evidence, the lack of evidence, or a conflict in the evidence. Id.

Pursuant to Indiana Code §§ 35-41-5-1 and 35-42-1-1, a person commits attempted murder when he intentionally⁹ engages in conduct constituting a substantial step¹⁰ toward killing another person. A conviction for attempted murder requires proof of specific intent to kill. Ramsey v. State, 723 N.E.2d 869, 871-72 (Ind. 2000); see Bethel v. State, 730 N.E.2d 1242, 1246 (Ind. 2000). ““The attempt must be to effect the proscribed result and not merely to engage in proscribed conduct.”” Ramsey, 723 N.E.2d at 871 (quoting Smith v. State, 459 N.E.2d 355, 358 (Ind. 1984)).

Intent to kill may be inferred from the use of a deadly weapon in a manner likely to cause death or great bodily injury, in addition to the nature of the attack and circumstances surrounding the crime. Corbin v. State, 840 N.E.2d 424, 429 (Ind. Ct. App. 2006). Intent to kill may be further established by a defendant’s use of a deadly weapon against the victim coupled with an announced intention to kill. Id.

Here, in the light most favorable to the conviction, the evidence demonstrates that Young was involved in an angry altercation with Della when he stabbed Shalena in the back so forcefully that it caused damage to her lung and liver; that shortly after Shalena was stabbed, Della indicated Young had also stabbed her and showed Shalena her bloody chest; that Jesse Isaac found Young leaning over Della and saying, multiple times, “I’m going to kill you, bitch”; that after police arrived, Young ignored their directions to lie on the floor and was poised to strike Della; and that Young was seen by Jolley with a

⁹ A person engages in conduct “intentionally” if, when he engages in the conduct, it is his conscious objective to do so. Ind. Code § 35-41-2-2 (Burns Code Ed. Repl. 2004).

¹⁰ A substantial step is any overt act beyond mere preparation and in furtherance of intent to commit an offense. Collier v. State, 846 N.E.2d 340, 344 (Ind. Ct. App. 2006), trans denied. Young does not challenge the sufficiency of the evidence on the basis of “substantial step.”

screwdriver in his hand, and the injuries suffered by Shalena and Della were consistent with having been caused by such a penetrating object. We recognize that the evidence is conflicting as to when exactly Della was stabbed, and that only Isaac heard Young say he was going to kill Della. We are disinclined, however, to construe the above evidence and any inconsistencies therein as a demonstration that Della's injury occurred absent specific intent on Young's part during the mutual tussle of their escalated argument, as Young would have us do. Such construction of the facts would constitute a reweighing of the evidence. The evidence indicating that Young was in possession of a screwdriver during a physical argument in which he stabbed both Shalena and Della and indicated he was going to kill Della is sufficient evidence of Young's specific intent to kill for purposes of upholding his conviction for attempted murder. We therefore reject Young's challenge to the sufficiency of the evidence.

Young's second challenge to his attempted murder conviction claims that the trial court erred in permitting the introduction into evidence of Della's statements made to Officer Dixon following the stabbing. Young claims that the statements do not qualify as an excited utterance under Indiana Evidence Rule 803(2), and that in light of Della's failure to testify at trial, the introduction of such statements into evidence violates the Confrontation Clause of the Sixth Amendment under Crawford v. Washington, 541 U.S. 36 (2004). The State appears to concede that such statements were likely in violation of the Confrontation Clause but argues that their admission into evidence constitutes harmless error in light of the other evidence establishing Young's attempted murder of Della.

Della Tucker did not testify at trial. The State sought to introduce some of the statements she made following the incident through the testimony of Officer Dixon. The defense objected on hearsay and Crawford grounds, and the trial court overruled the objections. Officer Dixon testified that he spoke to Della approximately two minutes after Young was placed in handcuffs and all objects in the room were secured. Although Della had been “hysterical” during the incident, she began calming down, according to Officer Dixon, although she was still “mad and upset” when first talking to Officer Dixon. Tr. at 69, 72. Officer Dixon testified that Della told him she had been involved in a physical altercation with her boyfriend, Young, and that he had stabbed her with a screwdriver. According to Officer Dixon, Della then reached between the couches, grabbed the screwdriver, and held it over her head, saying ““This right here.”” Tr. at 73.

Indiana Evidence Rule 803(2) provides that a statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition will not be excluded as hearsay. Whether a statement constitutes an excited utterance is essentially a factual issue subject to a clearly erroneous standard of review, sometimes described as the functional equivalent of abuse of discretion. Davenport v. State, 749 N.E.2d 1144, 1148 (Ind. 2001), cited in, Hammon v. State, 829 N.E.2d 444, 449 (Ind. 2005), overruled on other grounds by Davis v. Washington, 126 S. Ct. 2266 (2006).

Any hearsay which is permitted under the rules of evidence, however, is also subject to the defendant’s right “to be confronted with the witnesses against him” under the Sixth Amendment to the United States Constitution. Crawford, 541 U.S. at 38.

Under Crawford, the Confrontation Clause bars “admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had a prior opportunity for cross-examination.” Id. at 53-54. In Davis, 126 S. Ct. at 2277-80, the United States Supreme Court overturned our Supreme Court’s holding in Hammon, 829 N.E.2d at 457-58, which had found that a victim’s oral statements to police responding to a report of a domestic disturbance were not testimonial because the officer was simply seeking to determine whether anything requiring police action had occurred, and if so, what, and the victim’s motivation was simply to convey basic facts with no indication that she wanted her initial statements preserved or subsequently used against her husband at trial. In determining that the victim’s oral statements in Hammon were testimonial, the United States Supreme Court held the following:

“Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.” Davis, 126 S. Ct. at 2273-74.

Several factors mentioned by the Court further illuminate such distinction: (1) whether the declarant was speaking about events as they were actually happening or describing past events; (2) whether the declarant was facing an ongoing emergency; (3) whether the nature of the questions asked by law enforcement were such that they elicited statements necessary to resolve the present emergency rather than simply to learn about past events; and (4) the level of formality of the interrogation. Gayden v. State, 863 N.E.2d 1193,

1197 (Ind. Ct. App. 2007) (citing Davis, 126 S. Ct. at 2276-77). In applying these factors to the facts in the Hammon case, the United States Supreme Court determined that the oral statements at issue were testimonial: they involved past conduct by the defendant; there was no emergency in progress; the nature of the questions was to inquire into past events; and while the disputed statements were elicited in a somewhat less formal proceeding, the victim was nevertheless in a separate room when questioned, and the questioning officer was receiving her replies for use in his investigation. Davis, 126 S. Ct. at 2278.

Here, we need not decide the validity of the statements under the Indiana Evidence Rules, because even the State concedes that the disputed statements were likely testimonial under the Davis standard: Della was being questioned about Young's past conduct; the emergency in progress had ended and Young was in handcuffs when Officer Dixon asked the questions eliciting the disputed statements; and the nature of Officer Dixon's questions was to learn about what had happened in the past rather than to resolve any emergency. We recognize there is conflicting evidence regarding the formality of the proceedings¹¹ but do not believe this element alters the apparent testimonial nature of the statements as evidenced by the above elements.

¹¹ Officer Dixon testified that Della spoke only after Young and "everybody else" were secured and removed from the room, but he also testified that when Della identified her assailant, she pointed to Young, whom he testified was seated on the couch beside her. Tr. at 69. Additionally, there is conflicting testimony from Officer Dixon as to Della's emotional state. He testified that she was "calming down" after the incident when officers were securing the scene, and that he did not speak to her until the scene was secured, but he also testified that upon first asking Della about the incident, she was "mad and upset" and "breathing heavily." Tr. at 68, 72.

We have determined, and the State in effect concedes, that Della's statements as reported by Officer Dixon were testimonial, and that the admission into evidence of these statements when she was never subject to cross-examination violates the Confrontation Clause of the Sixth Amendment. Nevertheless, as the State argues, denial of the right of confrontation is harmless error where the evidence supporting the conviction is so convincing that a trier of fact could not have found otherwise. Garner v. State, 777 N.E.2d 721, 725 (Ind. 2002); D.G.B. v. State, 833 N.E.2d 519, 528 (Ind. Ct. App. 2005). Federal constitutional errors must be harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18, 24 (1967), overruled on other grounds by Estelle v. McGuire, 502 U.S. 62 (1991).

The thrust of Della's inadmissible statements as reported by Officer Dixon was to establish that (1) Young had stabbed her, and (2) he had stabbed her with the screwdriver depicted in State's Exhibit 9 and introduced as State's Exhibit 16. The State argues that even without these inadmissible statements, other unchallenged evidence established beyond a reasonable doubt that Young had stabbed Della with a screwdriver. As the State points out, Shalena testified that Young had stabbed her during the melee with the screwdriver introduced as State's Exhibit 16, and that Della had said to her, also during the melee, "[T]his crazy man done stabbed me." Tr. at 27. Shalena further testified that, upon asking Della where he had stabbed her, Della showed Shalena her chest, where Shalena observed blood. At this point, according to Shalena, she knew Young had stabbed Della. Shalena's testimony regarding Della's statements was not objected to at trial, and there is no claim upon appeal that it was improperly admitted.

Further, with respect to the screwdriver, Shalena's testimony indicated she and Della were stabbed within a fairly short period of time, and that Shalena was stabbed by the screwdriver in State's Exhibit 16. Further, Jolley testified that upon arriving on the scene, he observed the screwdriver in State's Exhibit 16 in Young's hand as Young stood above Della. Given the testimony establishing that Young stabbed Della, that Young was in possession of a screwdriver during the melee, that he stabbed Shalena with that screwdriver, and that he was seen holding it while positioned "above" Della when Jolley and the Isaac brothers arrived to assist her, we conclude that absent Della's inadmissible statements to Officer Dixon, the evidence supporting Young's conviction of attempted murder was still so convincing that the trier of fact would not have found otherwise. Accordingly, we conclude that the erroneous introduction into evidence of Della's statements as reported by Officer Dixon was harmless error.

Young's final challenge upon appeal is to his sentence. Young claims, pursuant to this court's decision in Robertson v. State, 860 N.E.2d 621 (Ind. Ct. App. 2007), trans. granted, that the trial court, in ordering that his sentence on the aggravated battery conviction be served consecutively with his attempted murder sentence, erred in enhancing the aggravated battery sentence to twelve years. Young claims that if the trial court wished to impose consecutive sentences, it was required to impose the advisory sentence of ten years for the aggravated battery. Young bases his claim upon his interpretation of the advisory sentence statute, Indiana Code § 35-50-2-1.3 (Burns Code Ed. Supp. 2006), which he claims requires the trial court, when it imposes consecutive

sentences, not to deviate from the advisory sentence. The advisory sentence statute reads as follows:

“(a) For purposes of sections 3 through 7^[12] of this chapter, ‘advisory sentence’ means a guideline sentence that the court may voluntarily consider as the midpoint between the maximum sentence and the minimum sentence.

(b) Except as provided in subsection (c), a court is not required to use an advisory sentence.

(c) *In imposing:*

- (1) *consecutive sentences in accordance with IC 35-50-1-2;*
- (2) *an additional fixed term to an habitual offender under section 8 of this chapter; or*
- (3) *an additional fixed term to a repeat sexual offender under section 14 of this chapter;*

a court is required to use the appropriate advisory sentence in imposing a consecutive sentence or an additional fixed term. However, the court is not required to use the advisory sentence in imposing the sentence for the underlying offense.” I.C. § 35-50-2-1.3 (emphasis supplied).

The consecutive sentence statute, Indiana Code § 35-50-1-2 (Burns Code Ed. Supp. 2006), referenced by I.C. § 35-50-2-1.3, reads in relevant part:

“(c) Except as provided in subsection (d)^[13] or (e),^[14] the court shall determine whether terms of imprisonment shall be served concurrently or consecutively. The court may consider the:

- (1) *aggravating circumstances in IC 35-38-1-7.1(a); and*
- (2) *mitigating circumstances in IC 35-38-1-7.1(b);*

¹² Sections 3 through 7 concern Murder, Class A felonies, Class B felonies, Class C felonies, and Class D felonies respectively.

¹³ Subsection (d) of I.C. § 35-50-1-2 requires the court to order sentences to be served consecutively, regardless of the order in which the crimes are tried and sentences are imposed, if after being arrested for one crime, the defendant commits another crime before the date the person is discharged from probation, parole, or a term of imprisonment imposed for the first crime, or while the defendant is released upon his own recognizance or on bond.

¹⁴ Subsection (e) of I.C. § 35-50-1-2 states that if the fact-finder determines that the defendant used a firearm in the commission of the offense for which he was convicted, the court must order the sentences for the “underlying offense” and the additional term of imprisonment imposed under I.C. § 35-50-2-11 to be served consecutively.

in making a determination under this subsection. The court may order terms of imprisonment to be served consecutively even if the sentences are not imposed at the same time. *However, except for crimes of violence,^[15] the total of the consecutive terms of imprisonment, exclusive of terms of imprisonment under IC 35-50-2-8 [governing habitual offenders] and IC 35-50-2-10 [governing habitual substance offenders], to which the defendant is sentenced for felony convictions arising out of an episode of criminal conduct^[16] shall not exceed the advisory sentence for a felony which is one (1) class of felony higher than the most serious of the felonies for which the person has been convicted.*” (emphasis supplied).

In support of his argument, Young relies solely upon the decision by another panel of this court in Robertson, 860 N.E.2d 621. In Robertson, the trial court ordered the defendant to serve an enhanced two-year sentence for Class D felony theft consecutive to the defendant’s sentence in another cause in another county. Upon appeal, the Robertson court concluded that I.C. § 35-50-2-1.3 prohibited trial courts from deviating from the advisory sentence for any sentence ordered to run consecutively. Id. at 624-25. However, on April 17, 2007, our Supreme Court granted transfer in Robertson, thereby vacating that opinion.

We further observe that the Robertson court specifically rejected the interpretation of I.C. § 35-50-2-1.3 found in the earlier opinion in White v. State, 849 N.E.2d 735 (Ind. Ct. App. 2006), trans. denied. In White, the defendant was convicted of murder and attempted murder in the same cause, and the trial court sentenced him to the maximum

¹⁵ Subsection (a) of I.C. § 35-50-1-2 defines a “crime of violence” as meaning: murder, attempted murder, voluntary manslaughter, involuntary manslaughter, reckless homicide, aggravated battery, kidnapping, rape, criminal deviate conduct, child molesting, sexual misconduct with a minor as a Class A or Class B felony, robbery as a Class A or Class B felony, burglary as a Class A or Class B felony, and causing death when operating a motor vehicle.

¹⁶ Subsection (b) of I.C. § 35-50-1-2 defines an “episode of criminal conduct” as meaning “offenses or a connected series of offenses that are closely related in time, place, and circumstance.”

terms of sixty-five and fifty years, respectively. The trial court also ordered the sentences to run consecutively, for an aggregate sentence of 115 years. Upon appeal, the defendant argued that I.C. § 35-50-2-1.3 required the court, in imposing consecutive sentences under I.C. § 35-50-1-2, to use the advisory sentences for both of his convictions. The White court rejected the defendant's claim, concluding that I.C. § 35-50-2-1.3 imposed no additional restrictions upon the ability of a trial court to impose consecutive sentences. 849 N.E.2d at 743.

More recently, in Barber v. State, 863 N.E.2d 1199 (Ind. Ct. App. 2007), another panel of this court agreed with the White court's interpretation of I.C. § 35-50-2-1.3, but added further explanation. The Barber court noted that I.C. § 35-50-2-1.3 was part of the post-Blakely sentencing amendments intended to rectify the Sixth Amendment infirmities in Indiana's sentencing scheme as identified in Smylie v. State, 823 N.E.2d 679 (Ind. 2005), cert. denied, 126 S. Ct. 545. See Barber, 863 N.E.2d at 1211. Under the post-Blakely "advisory sentence" scheme, a trial court may, but is not required to, impose the advisory sentence, which in terms of length is identical to the prior presumptive sentence. See Barber, 863 N.E.2d at 1211. According to the Barber court, I.C. § 35-50-2-1.3 explains that an advisory sentence "is in most cases exactly that—advisory" Id.

Under the pre-Blakely scheme, the presumptive sentence was also used in I.C. § 35-50-1-2 to calculate the "cap" on the aggregate length of consecutive sentences involving non-violent single episodes of criminal conduct. When replacing the term "presumptive" with the otherwise non-binding "advisory" sentence, the General Assembly, in I.C. § 35-50-2-1.3(c) reminded trial courts of those statutory provisions that

do require the “use” of an advisory sentence (by using the advisory sentence to determine the relevant range or cap on aggregate sentences): “(1) in imposing consecutive sentences in accordance with Indiana Code § 35-50-1-2; (2) in imposing an additional fixed term to an habitual offender under Indiana Code § 35-50-2-8; and (3) in imposing an additional fixed term to a repeat sexual offender under Indiana Code § 35-50-2-14.” Barber, 863 N.E.2d at 1211.

We agree with the Barber court that trial courts are required to “use” advisory sentences only in those situations where another statute requires use of the advisory sentence, and specifically, with respect to I.C. § 35-50-1-2, only in determining the relevant cap on the total length of consecutive sentences for non-violent episodes of criminal conduct. See id. Following the holdings in White and Barber, we reject Young’s argument that the trial court was required to impose the advisory sentence when it ordered his sentence for aggravated battery to be served consecutively with his sentence for attempted murder.¹⁷ See also Dixon v. State, No. 49A02-0609-CR-295

¹⁷ We further acknowledge, as did the court in Barber, that under the Robertson court’s interpretation of I.C. § 35-50-2-1.3, a host of problems could arise. The trial court in Robertson ordered the defendant’s sentence to be served consecutively to a sentence in another cause. The Robertson court noted that the trial court in the other cause was not restricted from deviating from the advisory sentence in the earlier-imposed sentence because the last part of I.C. § 35-50-2-1.3(c) states that the court “is not required to use the advisory sentence in imposing the sentence for the underlying offense.” (emphasis supplied). This provision might seem unproblematic in cases such as Robertson in which the trial court has ordered the sentence imposed to be served consecutively to an already-imposed sentence in another cause. In such cases, the earlier-imposed sentence could be considered the “underlying offense.” However, things are less clear under circumstances similar to those which were present in both White and Barber in which the defendants were convicted of multiple crimes and in which the trial courts ordered those simultaneously-imposed sentences to be served consecutively. As noted in Barber:

“Which of Barber’s two reckless homicide convictions is the ‘underlying offense’? The problem becomes more evident when applied to the facts in White. White was convicted of murder and attempted murder in the same cause.

(Ind. Ct. App., May 4, 2007); and Luhrsen v. State, No. 15A01-0605-CR-198, 2007 WL 1166056 (Ind. Ct. App. April 20, 2007) (following White and rejecting Robertson).

Having found sufficient evidence of Young’s conviction of attempted murder and that the Confrontation Clause violation at trial constituted harmless error, and having rejected Young’s challenge to his sentence, we hereby affirm Young’s convictions for attempted murder, aggravated battery and resisting law enforcement and his aggregate sentence of eighty-two years executed in the Department of Correction.

The judgment of the trial court is affirmed.

ROBB, J., and BARNES, J., concur.

Under Robertson, how would the trial court have decided which offense was the ‘underlying offense’?” Barber, 863 N.E.2d at 1212.

We can imagine similar questions involving defendants sentenced to consecutive sentences in the same cause which sentences are also ordered to run consecutively to sentences in one or more previous convictions. We need not delve into the various permutations which could arise in such hypothetical situations. We simply note that the interpretation of I.C. § 35-50-2-1.3 found in White and Barber, which we follow today, avoids these issues.

Further, under the Robertson court’s interpretation, even violent felons would receive the benefit of I.C. § 35-50-2-1.3’s supposed restrictions upon consecutive sentences—a benefit I.C. § 35-50-1-2 itself specifically denies to violent felons. See Joel M. Schumm, Interpreting the Law: Decisions Reflect Different Approaches, Res Gestae, April 2007 at 38-39 (discussing the conflict between the White and Robertson holdings and noting that that post-Blakely amendments to the sentencing statutes were meant to rectify Blakely concerns, not “limit the longstanding ability of trial courts to impose enhanced and consecutive sentences in most circumstances.”).